SUPREME COURT, U. S.

FILED
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IN THE

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1969

**No. 1087**

BRUCE KOZEROWITZ,
*Appellant,*

versus

A. J. STACK and the
FLORIDA REAL ESTATE COMMISSION
*Appellees.*

ON APPEAL FROM THE SUPREME COURT
OF FLORIDA

## APPELLEES' MOTION TO DISMISS

FRANK A. WILKINSON
Attorney for Appellees
Florida Real Estate Commission
State Office Building
Winter Park, Florida 32789

CURTIS B. GOFF
ATTORNEY AT LAW
101 S. Lake Avenue
Orlando, Fla. 32802

BREWTON CO.—ORLANDO

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*Appellees.*

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ON APPEAL FROM THE SUPREME COURT OF FLORIDA

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## APPELLEES' MOTION TO DISMISS

The Appellees, A. J. Stack and the Florida Real Estate Commission, pursuant to Rule 16, Rules of the Supreme Court of the United States, move this Honorable Court to dismiss the appeal in the above-styled cause on the grounds that:

(1) This Court does not have jurisdiction in the cause by appeal or certiorari in that the judgment appealed from is not a final judgment as required by Title 28, United States Code, sec. 1257;

(2) The appeal does not present a substantial federal question;

(3) The federal questions sought to be reviewed were not timely or properly raised, or expressly passed upon; and

(4) The judgment rests on an adequate non-federal basis.

## ARGUMENT

The judgment of the Supreme Court of Florida is not "final" within the intendment of Title 28, United States Code, sec. 1257, in order to confer jurisdiction upon this Court for review by either appeal or certiorari because it is interlocutory in nature and the underlying cause is still at the pleading stage.

A brief review of the proceedings which culminated in the judgment of the Supreme Court of Florida will show the interlocutory nature of the judgment.

This is an administrative proceeding which commenced when A. J. Stack, an authorized representative of the Florida Real Estate Commission, a state agency hereinafter called the "Commission", filed an Information before the Commission in three Counts (Appendix A) against the appellant, as defendant, seeking the revocation or suspension of the appellant's registration as a real estate salesman. After notice, the appellant filed a Motion to Quash the In-

formation (Appendix B) and an Answer to the Information (Appendix C). After notice and hearing on the Motion to Quash, the Commission entered its Order (Appellant's Appendix B, Jurisdictional Statement) denying the appellant's Motion to Quash the Information on December 18, 1967. It is this Order of the Commission which was under review in the Florida appellate courts.

On appellant's timely filed petition for writ of certiorari in the District Court of Appeal of Florida, Third District, the District Court in its decision (reported at 219 So.2d 469 and set out herein as Appendix D) granted certiorari to quash Count One of the Information but upheld Counts Two and Three of the Information, and concluded it's Opinion, at page 471, as follows:

> "Accordingly, the order appealed from is affirmed in part and reversed in part, as and in the respects set out above, *and the cause is remanded to the board for further proceedings.*
>
> "It is so ordered". (Emphasis supplied.)

Thereafter, upon certification of a question by the District Court of Appeal, the appellant filed a petition for writ of certiorari in the Supreme Court of Florida to review the District Court's decision. The decision of the District Court of Appeal was reviewed but it was not disturbed and the writ was discharged.

Thus, the effect of the judgment of the Supreme Court of Florida was to remand the proceedings to the Commission for further proceedings in accordance with the Opinion and order of the District Court of Appeal, supra.

Since the case is still at the pleading stage before the Commission, the "further proceedings" which may take place include a multiplicity of possibilities, including one or more of the following:

1. The filing of an amended information by the plaintiff, Stack, in an attempt to cure the deficiency in Count One pursuant to Sec. 475.30(2), Florida Statutes (Appendix E), with a consequent opportunity on the part of the defendant-appellant to again respond by a new answer and motion to quash pursuant to Sec. 475.30(1), Florida Statutes (Jurisdictional Statement, p. 4); or

2. The plaintiff may elect not to amend the Information, but the defendant-appellant may elect to amend his Answer to conform to the opinions of the Florida appellate courts; or

3. The plaintiff may move for final order on the pleadings as they stand; and, if so, the Commission may:

(a) Treat the Answer as being in the nature of a general denial or plea of "not guilty" sufficient to join issue for trial; or

(b) Treat the Answer as no answer and find the defendant-appellant to be in default; or

(c) Consider the Answer to be sufficient in form to constitute an admission of the allegations in the Information and adjudge the defendant-appellant guilty; or

4. After trial on such issues as may ultimately be made, the defendant-appellant may be adjudged either guilty or not guilty of one or more of the offenses charged by a final order entered by the Commission, which final

order would be subject to review on certiorari in the appropriate District Court of Appeal under Section 475.35, Florida Statutes (Appendix F).

The nonfinality of the judgment of the Supreme Court of Florida is also quite evident in this proceeding from the nature of the issues raised by the appellant.

Appellant's Questions One and Two raised here are essentially the same as those raised initially before the Commission in the Motion to Quash and in both of the Florida appellate courts.

Question One alleging the unconstitutionality of the statute requiring a verified answer to the information was prematurely raised by the original Motion to Quash the Information. The only matter on review that had to be decided at any stage below was the propriety of the Commission's Order upholding the sufficiency of the allegations of the Information. The Motion to Quash the Information cannot properly include a test of the sufficiency of the Answer to the Information. (475.30, Florida Statutes).

The appellant's first question goes exclusively to the premature question of whether or not appellant's Answer, which does not comply with the provisions of the statute, is sufficient to raise an issue of fact because the statute itself makes allegedly unconstitutional demands upon the defendant-appellant.

Question Two is equally premature for it attempts to test the constitutionality of trial procedures in the administrative proceeding for not affording a jury trial for the determination of such properly raised issues of fact as may ultimately be made from the pleadings. The consideration of these questions, therefore, merely amounted to dictum in

the opinions of the District Court of Appeal and the Supreme Court of Florida.

The entire record, as may be finally established from "further proceedings" before the Commission, will be subject to judicial review in the state appellate courts and, if such questions are preserved, such review would include a determination as to whether or not any of the constitutional rights of the defendant-appellant were violated in the proceedings.

A state court judgment within the appellate jurisdiction of this Court, must be "final" in the sense that it must constitute an effective determination of the litigation and not be merely an interlocutory or intermediate step in the proceeding. The judgment must also be subject to no further review or correction in any other future tribunal. *Market Street Railway Company v. Railroad Commission of State of California*, 324 U. S. 548, 65 S. Ct. 770, 89 L. Ed. 1171, rehearing denied 324 U. S. 890, 65 S. Ct. 1020, 89 L. Ed. 1438 (1945).

This Court is entitled to examine the whole record in order to determine the question of the finality of the state court judgment for the purpose of determining this Court's jurisdiction to review. *Local No. 438 Construction & General Labors' Union, AFL-CIO v. Curry*, 371 U. S. 542, 83 S. Ct. 531, 9 L. Ed. 2d 514.

The record in this case shows that the judgment of the Supreme Court of Florida here sought to be reviewed is merely an interlocutory judgment not reviewable on appeal in this Court. *Republic Natural Gas Company v. State of Oklahoma*, 334 U. S. 62, 68 S. Ct. 972, 92 L. Ed. 1212 (1948).

The fact that the Supreme Court of Florida may have had a federal question presented to it for decision does not necessarily vest jurisdiction in this Court to review the state court decision involving such federal question for, in order to vest jurisdiction here, the determination of the federal question must also have been necessary to a determination of the cause and, additionally, the federal question must have actually been decided or the judgment as rendered be such that it could not have been given without deciding such question. *Southwestern Bell Telephone Company v. State of Oklahoma,* 58 S. Ct. 528, 303 U. S. 206, 82 L. Ed. 751 (1938). In view of the interlocutory and anticipatory nature of the purported federal questions raised in this instance, it is evident that although the federal questions may have actually been decided, the judgment could have been given without deciding such questions and they were not necessary to a determination of the cause.

This Court will not decide constitutional issues which are hypothetical or are in advance of a strict necessity for deciding them as it is without power to give advisory opinions and it is not its practice to decide abstract, hypothetical or contingent questions. *Alabama State Federation of Labor v. McAdory,* 65 S. Ct. 1384, 325 U. S. 450, 89 L.Ed. 1725 (1945). *Ashbury Hospital v. Cass County, North Dakota,* 66 S. Ct. 61, 326 U. S. 207, 90 L. Ed. 6 (1945).

Conceding for argument only that the matters presented may have been finally decided by the Supreme Court of Florida, this Court may nevertheless properly conclude that the federal question decided was not so substantial as to necessarily vest in this Court jurisdiction to review the decision. *Zucht v. King,* 43 S. Ct. 24, 260 U.S. 174, 67 L. Ed 194 (1922). *Seaboard Air Line Railway Com-*

*pany v. Watson*, 53 S. Ct. 32, 287 U. S. 86, 77 L. Ed 180 (1932).

If the state court judgment was based upon an adequate and independent non-federal ground, the federal question that may be involved is not substantial. This is so even though the federal question perhaps was even wrongly decided. *Fox Film Corporation v. Muller*, 296 U.S. 207, 80 L. Ed 158 (1935).

The third question raised by the appellant, therefore, should additionally fall of its own weight. This question is not a substantial federal question under the principles announced by this Court in the case of *Wagner Electric Manufacturing Co. v. Lyndon*, (cited by appellant in his Jurisdictional Statement at page 12), notwithstanding appellant's argument that the case is distinguishable. These principles are that the method for review of the judgments of state courts is within the control of the state legislature governed by the Florida law and this Court is bound to accept the decision of the Florida courts thereon. Although we have found no Florida decision on this particular question, it would appear that since the question itself was raised by the appellant in his petition to the Supreme Court of Florida for rehearing, the rejection of the petition was a determination that the decision comports with the Florida law.

## CONCLUSION

Based upon the foregoing, the appellees respectfully submit to this Honorable Court that the judgment of the Supreme Court of Florida sought to be reviewed by appeal here is not "final" within the intent and meaning of Title 28,

United States Code, sec. 1257, and since no substantial federal question is presented, this appeal should properly be dismissed.

Respectfully submitted,

/s/ CURTIS B. GOFF

[redacted]

Attorney for Appellees
Florida Real Estate Commission
State Office Building
Winter Park, Florida 32789

## CERTIFICATE OF SERVICE

I, CURTIS B. GOFF, [redacted], attorney for the appellees, hereby certify that on the 16 day of February, 1970, I served a copy of the foregoing Appellees' Motion to Dismiss, together with the Appendix thereto, by mailing said copy by U. S. mail to Shalle Stephen Fine, attorney for Appellant, 1237 City National Bank Building, Miami, Florida.

/s/ CURTIS B. GOFF

[redacted]

Attorney for Appellees

# APPENDIX

# APPENDIX A

FLORIDA REAL ESTATE COMMISSION
PROGRESS DOCKET

**No. 1752**

DADE COUNTY

A. J. STACK,

*Plaintiff,*

*vs.*

BRUCE KOZEROWITZ, a/k/a BRUCE KAYE, and DYNAMIC DEVELOPMENT CORP.,

*Defendants.*

Filed 15th day of September, 1967;

FLORIDA REAL ESTATE COMMISSION

by K. EVANS

## INFORMATION

A. J. Stack, an authorized representative of the Commission, pursuant to permission heretofore given him by the Commission, files this INFORMATION, as plaintiff, against Bruce Kozerowitz, also sometimes known as Bruce Kaye, registered salesman, (herein referred to as Bruce Kozerowitz) and Dynamic Development Corp., registered broker, as defendants, and alleges:

The last address the defendant, Bruce Kowerowitz, has registered with the Commission is as a registered salesman, c/o Dynamic Development Corp., 8101 Biscayne

Boulevard, Miami, Florida, 33138; at all times alleged in this INFORMATION the defendant, Bruce Kozerowitz, was registered with the Florida Real Estate Commission as a real estate salesman; the last address the defendant, Dynamic Development Corp., has registered with the Commission is as a registered corporate broker, National Bank Building; 8101 Biscayne Boulevard, Miami, Florida, 33138; at all times alleged in this INFORMATION the defendant, Dynamic Development Corp., was registered with the Florida Real Estate Commission as a real estate broker; plaintiff is informed and believes, and on such knowledge, information and belief, further alleges:

## COUNT ONE

For Count One, plaintiff alleges:

(1) The defendant, Bruce Kozerowitz, obtained registration as a real estate salesman with the Commission on an application sworn to by the defendant, Bruce Kozerowitz, on October 4, 1965 and filed with the Commission on October 6, 1965, a copy of which application is attached hereto as Exhibit "A", and incorporated herein by reference.

(2) Question One (1) as contained in said application states "Name of applicant: _____", and the defendant answered said question in the following manner, to-wit: "Bruce Kozerowitz."

(3) Question Twenty (20) in said application states: "Have you ever gone under, or been generally called by, or have you ever done business under, any other name, or alias than the one signed in the affidavit below? _____. If your answer is in the affirmative, state the name or alias

used, and why used, and during what period of time? _____", and the defendant answered, "No" to the first part of said question Twenty (20) as above set forth without any qualification whatsoever.

(4) The Affidavit of Applicant at the end of said application was duly executed before a Notary Public on October 4, 1965, and the signature of applicant as contained therein was written as follows, to-wit: "Bruce Kozerowitz."

(5) The defendant, Bruce Kozerowitz, had frequently, prior to the filing of said application, gone under, been generally called by, and had done business under, the name of "Bruce Kaye" in addition to the name "Bruce Kozerowitz," all of which was not disclosed by defendant to the Commission at the time of the filing of said application.

Wherefore, the defendant did obtain his registration by means of misrepresentation and concealment in violation of Subsection 475.25(2), Florida Statutes.

## COUNT TWO

For Count Two, plaintiff alleges:

(1) On September 30, 1966, the registration certificate #36939 of the defendant, Bruce Kozerowitz, as a real estate salesman, expired, and at the time of the expiration thereof, the defendant, Bruce Kozerowitz, was registered with the Commission in the employ of the defendant, Dynamic Development Corp.

(2) On February 1, 1967, and at no time prior thereto, the defendant, Bruce Kozerowitz, filed his application.

for renewal of his registration as a real estate salesman by the filing of his sworn application therefor executed by him before a Notary Public on January 30, 1967, a copy of which renewal application is attached hereto as Exhibit "B" and incorporated by reference herein, and upon said application having been filed with the Commission and the appropriate fee being paid therefor, certificate #59500 was issued by the Commission to the defendant, Bruce Kozerowitz, as a registered real estate salesman in the employ of the defendant, Dynamic Development Corp.

(3) During the period of time from September 30, 1966 to February 1, 1967, the defendant, Bruce Kozerowitz, was not the holder of a valid current registration certificate as a real estate broker or salesman issued by the Commission.

(4) During the period of time in which the defendant, Bruce Kozerowitz, was not the holder of a valid current registration certificate as aforesaid, he remained in the employ of the defendant, Dynamic Development Corp., and operated in the state of Florida during said period of time as a real estate salesman, and a few but not all of the real estate sales transactions participated in by the defendant, Bruce Kozerowitz, as a salesman, were purchases by the following named individuals of real property located in the state of Florida, to-wit: Irma Deal, Richard E. Zeftwoch, Ralph A. Vitale, William S. Burdett, Auburn Duncan, Rev. Fred Voightman, Mr./Mrs. Gerald Alexander, Audrey Landquist, Geraldine Taggart, Dr. L. H. Blevins, Mervin A. Mages, Henry A. Peterson, Melvin Nelson, Albert Hoyland, G. E. Baker, Margaret Kindler, Ray Cook, Gary D. Leffler, S. L. Gulden, Paul R. Umberger, and F. E. Wilmot.

Wherefore, the defendant, Bruce Kozerowitz, is guilty of operating as a real estate salesman without being the

holder of a valid current registration certificate in violation of Subsection 475.42(1)(a), Florida Statutes, and by reason of said violation is guilty of the violation of the provisions of Subsection 475.25(1)(d), Florida Statutes; and further, by reason of the foregoing, the defendant, Dynamic Development Corp., is guilty of employing, or continuing in the employ of a person as a real estate salesman who is not the holder of a valid current registration certificate as salesman in violation of Subsection 475.42(1)(c), Florida Statutes, and by reason thereof the defendant Dynamic Development Corp. is guilty of the violation of the provisions of Subsection 475.25(1)(d), Florida Statutes.

## COUNT THREE

Re-alleging all the matters and things set out in Count Two hereof and making them a part of this Count Three as if fully set out herein, plaintiff further alleges:

(1) That the sworn affidavit filed with the Commission on February 1, 1962, seeking the renewal of his registration as a real estate salesman and further seeking the issuance of a current certificate thereas, heretofore attached as Exhibit "B", contains the following statement: "Have you been employed, acted or attempted to act or held yourself out as entitled to act as a real estate salesman or broker since your last certificate expired? _____," and in his sworn answer thereto, the defendant, Bruce Kozerowitz, answered "No."

(2) That in reliance upon the aforesaid false answer of the defendant, Bruce Kozerowitz, to said question on said sworn application, the Commission issued its certificate #59500 to the defendant, Bruce Kozerowitz, renewing

the registration of the said defendant as a real estate salesman.

Wherefore, the defendant, Bruce Kozerowitz, is guilty of having obtained a registration certificate as a real estate salesman by means of misrepresentation and concealment in violation of the provisions of Subsection 475.25(2), Florida Statutes.

WHEREFORE PLAINTIFF PRAYS that this INFORMATION be filed and notice of the filing thereof be given to the defendants and that other proceedings be had, all in accordance with the provisions of Chapter 475, Florida Statutes, and if the evidence warrants, the registration of Bruce Kozerowitz, be revoked, and the registration of Dynamic Development Corp., be suspended.

/s/ A. J. STACK
Plaintiff

/s/ THOMAS M. HENKEL, JR.
Attorney for Plaintiff
Florida Real Estate Commission
State Office Building
Winter Park, Fla. 32789

TMH/vbc

(Exhibits Omitted)

## APPENDIX B

FLORIDA REAL ESTATE COMMISSION
PROGRESS DOCKET

**No. 1752**

DADE COUNTY

A. J. STACK,

*Plaintiff*

*vs.*

BRUCE KOZEROWITZ a/k/a BRUCE KAYE and DYNAMIC DEVELOPMENT CORP.,

*Defendants*

Filed 19th day of October, 1967

FLORIDA REAL ESTATE COMMISSION

K. EVANS

## MOTION TO QUASH

Defendant, BRUCE KOZEROWITZ, moves to quash the information herein filed against him because:

1) It affirmatively appears that the Commission's action contemplated by Count One was not commenced within one year and is therefore barred by the Statute of Limitations, Florida Statutes 95.11(7)(a), which provides that an action by the State for a penalty or forfeiture under a penal act of the legislature must be commenced within one year from the date of the alleged offense.

2) It affirmatively appears from the allegations of Count Two of the information that taking the allegations of fact of that Count as true, the Defendant was the holder of a valid current registration certificate as defined by Florida Statute 475.42(3)(b) between September 30, 1966 and February 1, 1967, inasmuch as based upon the allegations of that Count, he held an active registration certificate which expired September 30, 1966, and which was based upon a registration that had not expired, been revoked or suspended and which was issued prior to the date of the act and expired subsequent thereto, said registration not expiring until March 31, 1967.

3) It affirmatively appears from the allegations of Count Two, that before the expiration of the registration of the Defendant, which registration would have expired on March 31, 1967, based upon the allegations of said Count Two, your Defendant made request for renewal and paid the fee therefore and was therefore entitled to act as broker or salesman, he not being under suspension at the time pursuant to the provisions of Florida Statute 475.21.

4) It affirmatively appears from the allegations of Count Three, that assuming the allegations to be correct, no offense is stated which would justify the imposition by the Commission of any penalty on the Defendant because, if the Defendant had answered the questions complained of by the Commission "yes" instead of "no", the Commission could not have refused to issue its certificate pursuant to the provisions of Florida Statute 475.20.

5) Section 475.30, Florida Statutes, requiring the Defendant to file a verified answer is unconstitutional as applied to the Defendant in this proceeding, firstly, because it compels the Defendant to incriminate himself in these

proceedings, and secondly, because it does not offer Defendant the immunity from further penalty or prosecution requisite to requiring the Defendant so to testify all in contravention of Defendant's rights under Secs. 1, 12, 13 and 15 of the Declaration of Rights of the Florida Constitution and the First, Fifth and Fourteenth Amendments to the Constitution of the United States and other applicable provisions of those charters.

6) The Commission's requirement that an Answer be filed at the same time that a Motion to Quash is filed by the Defendant is an improper construction of applicable Florida Statute, whereas the true construction thereof requires that a Motion to Quash be allowed to be filed and determined before issue is joined.

7) The revocation of Defendant's salesman's license based upon the facts alleged in the information or any Count thereof would expose and subject the Defendant to Double Jeopardy, contrary to the provisions of the Fifth and Fourteenth Amendments to the United States Constitution and to the provisions of Sections 1 and 12 of the Declaration of Rights of the Florida Constitution.

8) To deprive Defendant of his salesman's license in these proceedings based upon the allegations of the information would deny to the Defendant the right of trial by jury guaranteed by Sections 3 and 11 of the Declaration of Rights, Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution and other applicable provisions of those charters.

9) To deprive the Defendant of his salesman's license in these proceedings based upon the allegations of the information, would impair the Defendant's rights not to be

held for answer to crime except as provided in Section 10 of the Declaration of Rights of the Florida Constitution.

/s/ SHALLE STEPHEN FINE
Attorney for Bruce Kozerowitz
1401 DuPont Building
Miami, Florida
377-9659

## CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was mailed by me to the Florida Real Estate Commission, Executive Office, Florida State Office Building, West Morse Boulevard, Winter Park, Florida, and a copy was mailed to Thomas M. Henkle, Jr., associate counsel, at the said address all on October 18, 1967.

/s/ SHALLE STEPHEN FINE

# APPENDIX C

FLORIDA REAL ESTATE COMMISSION
PROGRESS DOCKET

**No. 1752**

DADE COUNTY

A. J. STACK,

*Plaintiff*

*vs.*

BRUCE KOZEROWITZ a/k/a BRUCE KAYE and DYNAMIC DEVELOPMENT CORP.,

*Defendants*

Filed 19th day of October, 1967

FLORIDA REAL ESTATE COMMISSION

by K. EVANS

## ANSWER

The Defendant, BRUCE KOZEROWITZ, for Answer to the information herein says:

1) He reserves to himself all of his rights under his Motion to Quash filed in this proceeding and does not waive any of them; and

2) For answer to the information and the allegations thereof, he neither admits nor denies the said allegations and demands strict proof and exact proof as to each and

every material allegation therein set forth, and he respectfully maintains that his further answering under oath would deprive him of the rights, privileges and immunities guaranteed to him under Sections 1, 12, 13 and 15 of the Declaration of Rights of the Florida Constitution and the First, Fifth and Fourteenth Amendments to the Constitution of the United States and other applicable provisions of those charters.

/s/ BRUCE KOZEROWITZ

/s/ SHALLE STEPHEN FINE
Attorney for Bruce Kozerowitz
1401 DuPont Building
Miami, Florida
377-9659

STATE OF FLORIDA )
) ss.
COUNTY OF DADE )

Before me, the undersigned authority, personally appeared BRUCE KOZEROWITZ, who after first being duly sworn, deposes and says that he has read the foregoing Answer and the same is true.

/s/ BRUCE KOZEROWITZ
Sworn to and subscribed before me this 18 day of October, 1967.

/s/ SHALLE STEPHEN FINE
Notary Public, State of Florida at Large. My Commission Expires September 15, 1968.

## CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was mailed by me to the Florida Real Estate Commission, Executive Offices, Florida State Office Building, West Morse Boulevard, Winter Park, Florida, and a copy was mailed to Thomas M. Henkel, Jr., associate counsel, at the said address all on October 18, 1967.

/s/ SHALLE STEPHEN FINE
Notary Public, State of Florida at Large. My Commission Expires September 15, 1968.

## APPENDIX D

Not final until time expires to file rehearing petition and, if filed, disposed of.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1968

**Case No. 68-160**

BRUCE KOZEROWITZ,

*Petitioner,*

*vs.*

A. J. STACK and THE FLORIDA
REAL ESTATE COMMISSION,

*Respondents.*

Opinion filed October 29, 1968.

A Writ of Certiorari to the Florida Real Estate Commission.
Shalle Stephen Fine, for petitioner

Frank A. Wilkinson and Thomas M. Henkel, Jr.,
for respondents.

Before CHARLES CARROLL, C. J., and
PEARSON and HENDRY, JJ.

CHARLES CARROLL, Chief Judge.

The Florida Real Estate Commision filed a three count information against the petitioner, in a proceeding for license revocation or suspension.

The petitioner filed a sworn answer as required, and with it filed a motion to quash the information. The Order of the board denying the motion to quash is presented here for review on certiorari.

The first count alleged that on October 4, 1965, the petitioner Bruce Kozerowitz obtained a registration certification as a real estate salesman, in the employ of Dynamic Development Corp.; that the certificate expired a year later, on September 30, 1966, and that on his application for renewal on February 1, 1967, the petitioner (defendant below) answered "no" to the question, "Have you ever gone under, or been generally called by, or have you ever done business under, any other name, or alias than the one signed in the affidavit below?" It was then alleged that the petitioner previously had gone by and done business under the name of "Bruce Kaye," and, as a conclusion, it was stated: "Wherefore, the defendant did obtain his registration by means of misrepresentation and concealment in violation of Subsection 475.25(2) Florida Statutes."

The subsection of the statute there referred to permits revocation of registration "if such registration, or a certificate issued thereon, is found to have been obtained by the registrant by means of fraud, misrepresentation or concealment."

That count fails to show that the incorrect or false answer to the question as to use of another name (which the law does not prohibit when used for proper purposes) was the basis or cause of the issuance of the renewal certificate. There is no allegation that the renewal would not have been issued if the fact of use of another name on some prior occasion or occasions had been disclosed. In the absence of such an allegation, or a showing or allegation of some established policy or regulation which would

preclude a registrant who previously had used another name from being entitled to obtain a renewal certificate, the count makes no sufficient showing that the renewal certificate was "obtained" by or because of the concealment of that fact; and the statement that it was, as an unsupported conclusion, did not serve to cure that material defect in the count.(1)

An analogy is shown in the law relating to insurance policies. Section 627.01081 of the Insurance Code (Ch. 627 Fla. Stat., F.S.A.), which deals with representations in applications for insurance, provides: "Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless either: (1) Fraudulent; or (2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued the policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise." And see Home Insurance Company v. Drescher, Fla.App.1968, 210 So.2d 451.

The substance of the allegations of the second count was that the appellant was guilty of a violation of § 475.25 (1)(d) Fla.Stat., F.S.A., for having operated as a real estate salesman during the period between expiration of

(1)As to the need, insuch a proceeding, for an offense proscribed by the statute to be sufficiently charged (notwithstanding the leeway allowed to the non-lawyer board members), see Hickey v. Wells, Fla.1956, 91 So.2d 206; State ex rel.Jordan v Pattishall, 99 Fla. 296, 126 So. 147, where this was discussed and applied.

his annual certificate on September 30, 1966, and the time he applied for renewal on February 1, 1967.

Count three charges a violation of § 475.25(2), alleging issuance of petitioner's renewal certificate was obtained by fraud in that on his application for renewal made on February 1, 1967, contrary to fact, he denied that he operated as a real estate salesman during the expiration period involved. The distinction between this count and the first count, as to sufficiency, is that the matter concealed here was something prohibited by § 475.25(1)(d), and which was separately charged as a violation of the statute in count two. For that reason it can be assumed, in support of count three, that the renewal certificate would not have been issued if the petitioner, in applying for it, had not denied operation as a salesman during the period in question.

The petitioner's claim of insufficiency of counts two and three is based on his contention that because § 475.01 (4) provides that a registration remains in force for six months after expiration of the period of the last registration certificate, during which six months it may be renewed on request with payment of fee, he was entitled to operate as a real estate salesman without a current (license) certificate in the interval between the expiration of his certificate (September 30, 1966) and the time he applied for a renewal and paid a fee therefor (February 1, 1967). We must reject that contention, because the section of the statute there relied on contains express language to the contrary, wherein it states "but registration alone shall not entitle the registrant to operate as a broker or salesman."

The brief of the respondent stresses the statutory language just mentioned, and argues correctly that under the

act it is required that a broker or salesman have an annual certificate for which a fee is paid, and that one whose certificate has expired at the end of a license year is prohibited from operating in such capacity during the six months in which the registration continues, prior to filing of a proper application for renewal with payment of fee.

We have also considered two other points raised by the petitioner. One was a contention that the requirement of the statute for one charged with a violation thereunder to make sworn answer is a violation of his constitutional privilege against self-incrimination. The other was a contention that one so charged before the board is entitled to a jury trial. Those contentions were considered previously and rejected in Robins v. Florida Real Estate Commission, Fla.App. 1964, 162 So.2d 535.

For the reasons stated we hold that the board ruled correctly in denying the motion to quash as to counts two and three of the information, but was in error in denying the motion to quash as to count one.

Accordingly, the order appealed from is affirmed in part and reversed in part, as and in the respects set out above, and the cause is remanded to the board for further proceedings.

It is so ordered.

# APPENDIX E

475.30 Answers, motions and defaults.—

(2) All questions of jurisdiction, or sufficiency of the information, and other matters of law may be raised by motion to quash, which motion shall be deemed, for the purpose only of said motion, to admit the truth of the facts alleged in the information. The defendant shall be entitled to an immediate hearing upon such motion to quash, and either party to the proceedings, or the commission on its own motion, may call said motion to quash up for hearing on ten days notice to the parties, and all procedings in the case shall abate until such motion to quash is heard and disposed of by the commission. In the event said motion to quash be denied by the commission, it shall enter its order to such effect, which order shall be reviewable on certiorari as provided in §475.35, but no supersedeas or stay of proceedings shall be granted pending such review except upon application as provided in §475.35. In the event the information shall be adjudged insufficient by the commission or on appeal, the plaintiff shall have the right to amend such information at any time within twenty days after the order holding said information to be insufficient shall have become final. In the event of necessity of procedure not specifically provided for herein, the procedure applicable in chancery practice and appeals shall govern so far as they may be applicable.

# APPENDIX F

475.35 Appellate review of proceedings.—The final orders and rulings entered or issued in any proceeding before the Florida Real Estate Commission shall be reviewable only by a writ of certiorari issued by the district court of appeals of the appropriate appellate district, or the supreme court, when permitted, as and in the manner provided by the Florida appellate rules or by chapter 120. The venue of the proceedings for such review shall be the appellate district which includes the county wherein hearings before the examiner are required to be heard under the provisions of §475.27; provided however, that if venue cannot be determined under §475.27, the the venue of such proceedings shall be the appellate district which includes the county wherein the executive offices of the commission are located. In all such cases the style of the cause in the court of appeals shall be ..... , Petitioner, vs. The Florida Real Estate Commission and (the original plaintiff), Respondents.